

The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order or other contracting action in the making of the sales contract. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. 86 Ill. Adm. Code 270.115. (This is a PLR).

September 6, 2002

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of July 29, 2002. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

COMPANY respectfully requests that the Illinois Department of Revenue issue a private letter ruling confirming the requester's views regarding two issues which arise in applying Illinois Retailers' Occupation Tax and Use Tax to a particular fact situation. This Request is submitted on behalf of the requester by its representative under the authority conferred by a power of attorney on Form IL-2848, which is attached as Exhibit A.

Statement of Material Facts

Seller was formed in 2001 by General Partner, as general partner with a one percent interest, and Limited Partner, as limited partner with a 99% interest. Limited Partner owns the entire member interest in General Partner.¹ Seller was formed to purchase Equipment from Vendors and, in Illinois, to resell such Equipment to the Illinois Operating Companies.² Seller's principal place of business is located outside the State and Seller does not currently have a sales office or sales acceptance facility in Illinois. Due to the automated nature of its business, Seller has no employees.

Current procedure for Equipment purchase transactions.

Equipment purchase transactions currently occur through Seller as follows:

An Engineer identifies a need for a particular item of Equipment, defines the technical specifications for the Equipment, and identifies the Vendor who can supply Equipment with those specifications.

The Engineer enters an equipment requisition into the purchasing system owned and maintained by Limited Partner for the benefit of itself, the other Operating Companies and Seller. The system is programmed to produce a purchase order to the applicable Vendor from Seller. This Seller purchase order identifies which Operating Company requested the Equipment and identifies the Equipment Site. Because Seller has issued each Vendor a resale exemption certificate with respect to each applicable taxing jurisdiction, the purchase order does not include state or local sales tax or use tax (*i.e.*, with respect to Illinois deliveries, the purchase order does not include state or local Retailers' Occupation Tax or Use Tax).

The Engineer prints this purchase order and faxes it to Vendor for processing. Vendor then, as specified on the Seller purchase order, either (i) drop ships the Equipment to the Equipment Site or to an Operating Company warehouse, or (ii) stores the Equipment at a Vendor warehouse for future delivery to the Equipment Site.

Following delivery by Vendor, Seller resells the Equipment to the Operating Company. This resale occurs at the time the Equipment is placed in service at the Equipment Site or, if the Operating Company is not wholly owned by Limited Partner and its wholly owned subsidiaries, immediately following the time Seller takes legal title to the Equipment from Vendor.

Vendor invoices Seller for payment of the Equipment purchase price. Limited Partner, on behalf of Seller, remits payment of the invoice to Vendor through the accounts payable system owned and maintained by Limited Partner, using funds from Limited Partner's bank account. In order to reflect this funding, and the funding of the subsequent resale of the Equipment to the Operating Company, the following items are reflected on a monthly basis on the books of Seller, General Partner, Limited Partner and the other Operating Companies:

Seller books an intercompany payable due to Limited Partner in the aggregate amount of Equipment-purchase payments made during the month to Vendors from Limited Partner's bank account (which is referred to here as the 'Seller Payable').

Seller books an intercompany receivable due from all Operating Companies in the aggregate amount of the price of Equipment resold by Seller to the Operating Companies during the month (the aggregate of such receivables from all Operating Companies is referred to here as the 'Seller Receivable').

The Seller Payable for the month is netted against the Seller Receivable for the month. If this results in a net payable, then the books of Seller are adjusted (*i.e.*, the net payable is extinguished) by executing an equity contribution to Seller from General Partner and from Limited Partner, each in an amount equal to the product of (i) the amount of the net payable and

(ii) the percentage of its partnership interest in Seller. If this results in a net receivable, then the books of Seller are adjusted (*i.e.*, the net receivable is extinguished) by executing a distribution from Seller to General Partner and to Limited Partner, each in an amount equal to the product of (i) the amount of the net receivable and (ii) the percentage of its partnership interest in Seller.

Proposed new procedure for Equipment purchase transactions.

The proposed new procedure for Equipment purchase transactions, involving Seller's Agent, will be initiated by the execution and delivery by the parties thereto of the Sale Agreement and the Agency Agreement. The material terms of these agreements are incorporated in the description of the proposed new procedure below.

Seller's Agent is not affiliated with Seller, General Partner or the Operating Companies. Seller's Agent maintains offices, staffed by employees of Seller's Agent, in Illinois in City A and City B, and outside Illinois in City C.

The proposed new procedure for effecting Equipment purchase transactions through Seller adds the following new steps to the current procedure described above:

After printing the Seller purchase order and faxing it to Vendor, the Engineer sends a copy of the printed Seller purchase order to Seller's Agent at its City C office.

Pursuant to the Agency Agreement, Seller's Agent is required to determine whether the Equipment Site described in the Seller purchase order is within a state where the new procedure applies.³

If the Equipment Site is within a state where the new procedure applies, Seller's Agent is required to generate, from its City C office, a complete and unconditional offer to sell document (referred to here as an 'Offer'), which includes as an exhibit an attached copy of the Seller purchase order and which includes the required terms. The required terms of the Offer are that (i) Seller offers to sell the Equipment described in the attached Seller purchase order to the Operating Company identified in the Seller purchase order at Seller's cost from the Vendor, (ii) the Operating Company is permitted to accept the offer only by delivering evidence of acceptance of the Offer to the office of Seller's Agent in City A or City B, as specified in the Offer, and (iii) the evidence of acceptance must be received by Seller's Agent on or before the deadline specified in the Offer.

If the delivery location identified in the purchase order is in City D, then Seller's Agent is required to specify the office of Seller's Agent in City B⁴ as the location for delivery of the acceptance of the Offer. If the delivery location is in Illinois and outside City D, then Seller's Agent is required to specify the office of Seller's Agent in City A as the location for delivery of acceptance of the Offer.

Seller's Agent forwards the Offer to the authorized representative of the Operating Company for accepting Offers.

Pursuant to the Sale Agreement, the Operating Company is entitled to purchase the Equipment described in the purchase order, and enters into a binding contract to do so, only by accepting the Offer and returning evidence of acceptance to the Seller's Agent location specified in the Offer.

Upon receiving evidence of acceptance, Seller's Agent verifies that the evidence was received at the correct location, that the acceptance was effected by an authorized representative of the Operating Company, and that the evidence of acceptance was received on or before the deadline. If the evidence is verified, the contract of sale becomes binding on Seller and the Operating Company.

As a supplement to the proposed new procedure described above, Seller's Agent is also required under the Agency Agreement to issue monthly Offers with respect to Equipment which, by reason of administrative error or otherwise, was not captured by the regular procedure. The only difference between this supplemental procedure and the regular procedure is that the Offer will attach aggregate information derived from monthly reports instead of individual purchase order copies.

The primary purpose of Seller and the Operating Companies for implementing this new procedure is to ensure that, when Equipment is sold to Illinois Operating Companies, such sale occurs in either City A or City B for purposes of Retailers' Occupation Tax.

Issues

1. With respect to Equipment transferred initially from a Vendor to Seller and then from Seller to an Illinois Operating Company, as described above, for which evidence of acceptance from the Illinois Operating Company is received by Seller's Agent in City A:

- a. Is Seller subject to Retailers' Occupation Tax in City A imposed at the rate in effect in City A?
- b. Is Seller subject to Retailers' Occupation Tax in any taxing jurisdiction other than City A?
- c. Is Seller subject to Use Tax in any taxing jurisdiction?
- d. Is the Illinois Operating Company subject to Use Tax in any taxing jurisdiction?

2. With respect to Equipment transferred initially from Vendor to Seller and then from Seller to an Illinois Operating Company, as described above, for which evidence of acceptance from the Illinois Operating Company is received by Seller's Agent in City B:

- a. Is Seller subject to Retailers' Occupation Tax in City B imposed at the rate in effect in City B?
- b. Is Seller subject to Retailers' Occupation Tax in any taxing jurisdiction other than City B?

- c. Is Seller subject to Use Tax in any taxing jurisdiction?
- d. Is the Illinois Operating Company subject to Use Tax in any taxing jurisdiction?

Relevant Authorities

Recent letter rulings indicate that, in the Department's opinion, the imposition of the various sales tax related local taxes in Illinois are triggered when 'selling' occurs in a jurisdiction imposing a tax. For example, in PLR ST-01-0003, February 2, 2001, the Department opined that where a centralized purchasing company sold goods to the parent company, those sales were situated to the municipality in which the seller received the purchaser's signed sales agreement (the final act necessary to bind the seller to the sale).

86 Ill. Adm. Code 270.115 specifically provides, in part:

- b) Seller's Acceptance of Order
 - 1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is accepted at the seller's place of business within the municipality or by someone who is working out of such place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, or if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the home rule municipality or by someone working out of such place of business, the seller incurs Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.

This regulation provides that upon the receipt of an order which is a purchaser's acceptance of a retailer's complete and unconditional offer to sell by someone working out of a place of business of the retailer in a home rule municipality, the retailer incurs Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality. We note also that the regulation refers not to an 'employee' working out of the seller's place of business, but rather to 'someone' working out of the seller's place of business. Based on this regulation, it seems to make no difference whether the receipt of the customer's acceptance is by the retailer's Seller's Agent or by the retailer's employee. (See ST 01-0034-PLR, August 13, 2001, which reaches the same conclusion).

Conclusion

Pursuant to the Sale Agreement, an Operating Company is entitled to purchase the Equipment described in a purchase order, and enters into a binding contract with Seller to do so, only by accepting the Offer and returning evidence of the accepted Offer to the

Seller's Agent location specified in the Offer in City A or City B. Therefore, our view is that, with respect to Equipment described in an Offer for which notice of acceptance is received by Seller's Agent in City A, Seller is only subject to Retailers' Occupation Tax in City A imposed at the rate in effect in City A, and neither Seller nor the Operating Company is subject to Use Tax in any taxing jurisdiction. Likewise, our view is that, with respect to Equipment described in an Offer for which notice of acceptance is received by Seller's Agent in City B, Seller is only subject to Retailers' Occupation Tax in City B imposed at the rate in effect in City B, and neither Seller nor the Operating Company is subject to Use Tax in any taxing jurisdiction.

We are unaware of any relevant authority which is contrary to our view.

Therefore, we respectfully request that the Department issue a private letter ruling confirming these conclusions.

Administrative Matters

As required by 2 Ill. Adm. Code 1200.110, Seller states that:

None of the issues described in this Request are involved in the return of Seller or any taxpayer related to Seller for an earlier tax reporting period, which return either is being examined as part of a Department audit or is involved in pending litigation.

To the best of the knowledge of Seller and of Seller's representative, the Department has not previously ruled on an issue which is the same as or similar to any issue described in this Request, for the Seller or any predecessor of Seller, and neither Seller nor, with respect to Seller, Seller's representative has previously submitted to the Department, and withdrawn before a Department ruling was issued, a request for a ruling on an issue which is the same as or similar to any issue described in this Request.

Pursuant to 2 Ill. Adm. Code 1200.110(c), Seller requests that the following information included in this Request be deleted from your ruling prior to public dissemination: the definition of each defined term which is listed in the General Information section of this Request, and the name of Seller's representative.

If any additional information is required, please contact ###. If you contemplate issuing a response to this Request that does not grant the requested rulings, or contemplate issuing a response that is other than in the form of a binding private letter ruling, then we respectfully request the opportunity to meet with you prior to such issuance.

As you know, the imposition of the various sales tax related local taxes in Illinois are triggered when "selling" occurs in a jurisdiction imposing a tax. 86 Ill. Adm. Code 270.115. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order or other contracting action in the making of the sales contract. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred.

Based upon the facts set forth in your letter, the acceptance of the purchase order takes place at the location of the vendor. When the engineer sends the purchase order to the vendor and the vendor accepts the purchase order and ships the merchandise acceptance has occurred. The seller's agent cannot accept purchase orders for Illinois tax purposes because the activities of the seller's agent occur after the order is sent to the purchaser by the vendor. Without the right of recall, the seller's agent is irrelevant to the sale and the acceptance of the purchase order. Therefore the local jurisdiction of the vendor is the location that has jurisdiction over the imposition of local taxes.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

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¹ Although it does not appear to be relevant for purposes of this Request, we note for your information that both General Partner and Seller are disregarded entities for purposes of both federal and Illinois income taxation.

² Outside Illinois, Seller either leases or resells Equipment to Operating Companies.

³ Initially, the proposed new procedure will only apply to purchase orders for which the delivery location is within Illinois.

⁴ City B currently imposes a one percent (1%) Home Rule Municipal Retailers' Occupation Tax.